IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NOS. 39 AND 40 OF 2002

Commissioner of Income Tax,
having office at Aayakar Bhavan
Patto Plaza, Panaji-Goa. ... Appellant

versus

1. Hydroflex Equipment Ltd.,
   Pajifond, Margao.

2. The Income Tax Appellate
   Tribunal Panaji Bench,
   Aayakar Bhavan,
   Patto Plaza, Panaji, Goa. ... Respondents

Mr. S. R. Rivonkar, Advocate for the Appellant.

None for the Respondent.

CORAM : A. P. LAVANDE &
N. A. BRITTO, JJ.

DATE : 8TH FEBRUARY,2005

ORAL JUDGMENT(PER N.A.BRITTO, J.)

These appeals are filed under Section 260-A of the Income Tax Act, 1961(the Act, for short) and were admitted on a substantial question of

law, common in both, which reads as follows:-

> "Whether on the facts and in the circumstances of the case, the finding of the ITAT that the assessee has a reasonable cause in not paying the tax is based on any material evidence on record?"

2. Since the substantial question of law framed is common in both the appeals, we propose to decide the same by this common Judgment. That apart, the Income Tax Appellate Tribunal, Panaji Bench, (ITAT, for short) has also decided the same by a common Order dated 31-10-2001.

3. The Respondent No.1(assessee, for short) has chosen not to contest these appeals. Both these appeals arise from the Orders passed by the Assessing Officer (Joint Commissioner of Income Tax) dated 17-12-1998 under Section 221(1) of the Act. The Tax Appeal No.39 of 2002 pertains to penalty levied by the said Assessing Officer in the sum of Rs.2,50,000/- for the assessment year 1996-97 while Tax Appeal No.40 of 2002 pertains to penalty levied for the assessment year 1997-98.

4. Since the facts are slightly dissimilar, we proceed to deal with Tax Appeal No.40 of 2002, first. In this case, the assessee filed a return of income(for the year 1997-98) declaring nil income on 29-1-1998 which

was processed under Section 143(1)(a) on 10-2-1998 with no adjustments. Later, the assessee filed a revised return declaring an income of Rs.21,36,790/- on 31-3-1998 and the tax payable as per this return was Rs.12,56,595/-, being the self assessment tax. This tax was not paid and as a result the Assessing Officer issued a Show Cause Notice dated 23-4-1998 under Section 221(1) of the Act. In reply to the said Show Cause Notice, the assessee requested for time but the same was refused by letter dated 13-5-1998. The Assessing Officer, therefore, found that the assessee was in default in payment of tax on the income declared by it and, therefore, proceeded to levy a penalty of Rs.2,25,000/-. The assessee filed an appeal to the Commissioner of Income Tax(Appeals) and the said appeal was disposed of by Order dated 12-3-1999. In disposing of the said appeal, the Commissioner of Income Tax came to the conclusion that there was no evidence, to support the submissions made, which was brought to the notice of the Assessing Officer in response to the said Show Cause Notice. The said Commissioner further observed that even in the course of appellate proceedings the assessee had failed to furnish any evidence whatsoever in that regard and the assessee also did not furnish the balance-sheet of the assessee-Company to support the plea regarding financial difficulty and, therefore, proceeded to dismiss the appeal observing that there was no material before him to infer that there was genuine reasonable cause for the default in question.

5. The assessee then approached the ITAT and the ITAT by its common Order dated 31-10-2001 stated that the Assessing Officer, the CCIT(A) and the Tribunal were fact finding authorities, in seriatim, and that the non payment of instalments granted by the CCIT would not lead to the conclusion that the assessee had no reasonable cause and the said acts supported the financial constraints of the assessee. It further held that the very act of the CCIT granted stay till 31-3-1998 itself showed that there was reasonable cause on the part of the assessee for non payment of taxes.

6. Section 221 of the Act deals with penalty payable when tax is in default. It reads as follows:-

> "Section 221(1) - When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of Section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assesssing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears:-

> Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard:
>
> Provided further that where the assessee proves to the satisfaction of the Assessing Oficer that the default was for good and sufficient reasons, no penalty shall be levied under the section.
>
> The explanation below the above proviso – (1) For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.
> (2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded".

7. Admittedly, the Show Cause Notices in this case (Tax Appeal No.40/2002) was issued by the Assessing Officer on 23-4-1998. In this case the assessee informed the Assessing Officer by letter dated 29-4-1998 that its Manager was hospitalised and sought time of 45 days. However, the

Assessing Officer by his letter dated 13-5-1998 rejected the request for both assessment years 1996-97 and 1997-98. The assessee took no further steps to approach any higher authorities nor showed any cause against the said Show Cause Notice. As far as this case is concerned, in our view the ITAT was not right in coming to the conclusion that there was reasonable cause on the part of the assessee for the non payment of taxes. As rightly held by the Assessing Officer as well as the Commissioner of Income Tax(Appeals) there was no material placed before the Assessing Officer or for that matter before the Commissioner of Income Tax(Appeals) that there was any sufficient cause for the non payment of the tax payable. Although, the assessee in his Affidavit before this Court has stated that before the Tribunal the entire evidence regarding the precarious financial position of the Company was explained along with supporting documents, we are not inclined to accept the said statement because it is contrary to what the Commissioner of Income Tax(Appeals) has stated in his Order and there is total silence as regards the same in the Order of the ITAT. No extension of time was granted to the assessee in this case.

8. However, the facts, as far as Tax Appeal No.39 of 2002 is concerned are slightly different. In this case the assessee filed return on 3-9-1997 declaring total income of Rs.30,79,150/- on which tax payable was Rs.23,40,650/- and due date for payment of the same was 3-9-1997. By

letter dated 11-11-1997 the assessee sought time to pay the same in instalments and the same was refused by the Assessing Officer by letter dated 4-12-1997. On the same day the assessee paid a sum of Rs.2.25,000/- towards the tax and again on 5-12-1997 paid another sum of Rs.2.75,000/- and thus Rs.5,00,000/- in all. Although, the Deputy Commissioner by another letter dated 13-5-1998 rejected the request of the assessee for the grant of time for payment of taxes for both the years, it appears that the assessee approached the Chief Commissioner of Income Tax, Bangalore with a request to extend time for the payment of taxes and the said Chief Commissioner of Income Tax by his letter dated 12-2-1998 was pleased to extend the time to pay the tax for the assessment year 1996-97 until 31-3-1998. When this position was brought to the notice of Mr. S. R. Rivonkar, the learned Counsel for the Commissioner of Income Tax, he has submitted that the Chief Commissioner of Income Tax had no authority to extend the time for the payment of the tax. In our view, it does not lie in the mouth of the Commissioner of Income Tax(Appellant herein) to say that his own Chief Commissioner of Income Tax had no authority to extend the time for the payment of the said tax. In our view, the very act of the Chief Commissioner of Income Tax in granting time to the assessee till 31-3-1998 showed that there was a reasonable cause on the part of the assessee for the non payment of the taxes in time. In other words, the Chief Commissioner of Income Tax was satisfied that there were good and

sufficient reasons that imposing of penalty was to be postponed at least until 31-3-1998 and being so, the Assessing Officer would have been justified in issuing a Show Cause Notice only after 31-3-1998 and not prior to the said date i.e. to say 16-10-1997. The said Show Cause Notice was therefore premature and the action taken thereon, therefore, could not be sustained in law. In our view, the ITAT was right in allowing the appeal holding that the assessee had not committed default to warrant institution of penalty proceedings as far as the assessment year 1996-97 is concerned.

9. Although, the assessee initially contested these appeals by filing an Affidavit, subsequently the assessee's Counsel Mr. E. P. Badrinarayan withdrew his appearance and at this time, Mr. Badrinarayan undertook to inform the assessee about his withdrawal. Accordingly, the Managing Director of the assessee was duly notified but the Managing Director by his application dated 3-1-2005 informed the Court that he is no more the Managing Director of the assessee. The assessee was lastly served by pasting a notice on the main shutter of the assessee's Office, and, yet none appeared on behalf of the assessee at the hearing of these appeals.

10. For the reasons stated hereinabove, the Order dated 31-10-2001 of the ITAT requires to be partly disturbed. Consequently, we allow Tax Appeal No.40 of 2002 and restore the

Orders dated 17-12-1998 and 12-3-1999 of the Assessing Officer and the Commissioner of Income Tax(Appeals) respectively, for the assessment year 1997-98. Tax Appeal No.39 of 2002 is dismissed and consequently, the Orders dated 17-12-1998 and 12-3-1999 of the Assessing Officer and the Commissioner of Income Tax(Appeals) for the assessment year 1996-97 are hereby set aside, with no order as to costs. The Assessing Officer would be free to issue a fresh Show Cause Notice for the assessment year 1996-97 in case the assessee is still sought to be penalised under Section 221(1) of the Act.

A. P. LAVANDE, J.

N. A. BRITTO, J.

RD.